MM 92-258

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *In Banc* October 19, 1994 Decided June 6, 1995

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 93–1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.; AMERICAN CIVIL LIBERTIES UNION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC., INTERVENORS

No. 93–1270

ALLIANCE FOR COMMUNITY MEDIA; ALLIANCE FOR COMMUNICATIONS DEMOCRACY; PEOPLE FOR THE AMERICAN WAY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC., INTERVENORS

No. 93–1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners. With him on the briefs were *Charles S. Sims, Lisolette E. Mitz, Marjorie Heins* and *Arthur B. Spitzer* for petitioners Denver Area Educational Telecommunications Consortium, Inc. and the American Civil Liberties Union, *David A. Bono, Michael K. Isenman* and *David B. Goodhand* for petitioners the Alliance for Community Media, the Alliance for Communications Democracy, and People for the American Way, *James N. Horwood* for petitioners the Alliance for Community Media and the Alliance for Communications Democracy, *Andrew J. Schwartzman* and *Elliot Mincberg* for petitioner People for the American Way.

Jacob M. Lewis, Attorney, Department of Justice, argued the cause for respondents. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, and *Barbara L. Herwig*, Attorney, Department of Justice, *William E. Kennard*, General Counsel, *Christopher J. Wright*, Deputy

General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Gregory M. Christopher*, Counsel, Federal Communications Commission.

Robert T. Perry was on the brief for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon. *Daniel L. Brenner*, *Neal M. Goldberg* and *Diane B. Burstein* were on the brief for intervenor National Cable Television Association, Inc. *H. Robert Showers* was on the joint brief for *amici curiae* National Law Center for Children and Families. With him on the joint brief were *James P. Mueller* for National Family Legal Foundation and *Paul McGeady* for Morality in Media, Inc.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* WALD, in which *Circuit Judge* TATEL joins and *Circuit Judge* ROGERS joins as to Parts II and III.

Opinion dissenting in part filed by *Chief Judge* EDWARDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge:* This case is here on petitions for review of two orders of the Federal Communications Commission implementing section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j), & 558). Petitioners are five organizations, some of whose members produce programming for cable "access" channels; an individual "access" programmer; and two other groups whose members watch cable television. The case was argued first to a panel of the court, which remanded it to the Commission on the grounds that sections 10(a) and 10(c) violated the freedom of speech clause of the

First Amendment to the Constitution and that section 10(b), and the Commission's regulations thereunder, posed such serious constitutional questions that the Commission ought to reconsider the matter in light of the unconstitutionality of sections 10(a) and 10(c). *Alliance for Community Media v. FCC*, 10 F.3d 812, 823–24, 829 (D.C. Cir. 1993). The full court vacated the panel's judgment. *Alliance for Community Media v. FCC*, 15 F.3d 186 (D.C. Cir. 1994). On rehearing the case *in banc*, we sustain section 10 and the Commission's regulations.

I

The Commission gradually began asserting jurisdiction over a form of cable television—community antenna television systems—in the early 1960's. Through that decade and into the next, the pace of regulation intensified. By 1980, however, the trend had reversed itself. The cable industry experienced substantial federal deregulation, driven in no small measure by the Supreme Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Court there struck down, as beyond the Commission's statutory authority over broadcasting, its 1972 rules (as modified by its 1976 rules) requiring cable operators to dedicate four of their "channels for public, governmental, educational, and leased access." *Id.* at 691. Cable operators "own the physical cable network and transmit the cable signal to the viewer." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1994). By "transferr[ing] control of the content of access cable channels from cable operators to members of the public," the Commission had—the Court held in *Midwest Video*—transformed cable operators into "common carriers." 440 U.S. at 700, 701. Congress had prohibited the Commission from imposing common-carrier obligations on broadcasters because this would intrude on their editorial control over programming. *Id.* at 705. Cable operators were situated similarly. They shared "with broadcasters a significant amount of editorial discretion regarding what their programming will include," and, like broadcasters, could not be burdened with common

carrier obligations without Congress' express direction. *Id.* at 707, 709.

The Cable Communications Policy Act of 1984 revived much of the agency-created system struck down five years earlier in *Midwest Video.* The 1984 Act compelled cable operators of systems with more than thirty-six channels to set aside between 10 and 15 percent of their channels for commercial use by persons unaffiliated with the operator. 47 U.S.C. § 532(b). On these "leased access" channels, the statute forbade the operator from exercising "any editorial control over" the programming, "except that an operator may consider such content to the minimum extent necessary to establish a reasonable price" for the use of the channel. 47 U.S.C. § 532(c)(2). In return, the 1984 Act exempted operators from criminal and civil liability arising from programs carried on leased access channels. 47 U.S.C. § 558 (amended 1992). While thus removing the operators' control over and legal responsibility for leased access programming, the 1984 Act empowered local franchising authorities to bar or regulate such programming if, in the authority's judgment, it "is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 532(h).

The 1984 Act also authorized local franchising authorities to require, as a condition for a franchise or for the renewal of one, that operators set aside "channel capacity" for "public, educational, or governmental use." 47 U.S.C. § 531. Subject to section 544(d), cable operators were forbidden from exercising any editorial control over programming shown on these "PEG access" channels. 47 U.S.C. § 531(e) (amended 1992). Section 544(d)(1) permitted cable operators and franchise authorities to specify that cable services would not be provided if they are "obscene or are otherwise unprotected by the Constitution." As with leased access, section 558 of the 1984 Act relieved cable operators from criminal and civil liability for programs carried on PEG channels.

In "order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber," section 544(d)(2) required cable operators to provide equipment—commonly known as a "lockbox"—enabling the subscriber to block a channel during particular periods. 47 U.S.C. § 544(d).

In 1992, for reasons we describe below, *see infra* pp. 19–20, Congress decided that revisions were needed in the 1984 Act's treatment of leased access and PEG access channels. Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, which is set forth in the margin,[1]

---

[1] Sec. 10. Children's Protection From Indecent Programming on Leased Access Channels

(a) Authority to Enforce.—Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended—

(1) by inserting "or the cable operator" after "franchising authority"; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.".

(b) Commission Regulations.—Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following new subsection:

"(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by—

"(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

altered the existing system in several ways. Section 10(a) permitted a cable operator to refuse to carry leased access programming the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pub. L. No. 102–385, § 10(a), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(h)). In order "to limit the access of children to indecent programming," section 10(b) directed the Commission to prescribe rules requiring cable operators who choose to carry indecent programming on leased access channels to place such programs on a separate channel and to block the channel until the subscriber, in writing, requests unblocking. *Id.* § 10(b) (to be codified at 47 U.S.C. § 532(j)). Section 10(c) required the Commission to promulgate regulations enabling cable operators to prohibit the use of PEG access channels for "any programming which contains obscene material, sexually ex-

---

"(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

"(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

"(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).".

(c) Prohibits System Use.—Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

(d) Conforming Amendment.—Section 638 of the Communications Act of 1934 (47 U.S.C. 558) is amended by striking the period at the end and inserting the following: "unless the program involves obscene material.".

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 10, 106 Stat. 1460, 1486 (1992) (codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

plicit conduct, or material soliciting or promoting unlawful conduct." *Id.* § 10(c) (to be codified at 47 U.S.C. § 531). Section 10(d) eliminated cable operators' immunity from criminal and civil liability for obscene programming shown on access channels. *Id.* § 10(d) (to be codified at 47 U.S.C. § 558).

In early 1993, the Commission released two Reports and Orders adopting regulations to implement section 10. In the first, the Commission issued regulations implementing sections 10(a) and 10(b), the provisions applying to leased access channels. The Commission defined "indecent" programming in terms nearly identical to those contained in the statute: "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(g)). Leased access programmers were required to inform the cable operator which, if any, of their programs fell into that category. *Id.* (to be codified at 47 C.F.R. § 76.701(d)). Mirroring the statute, the regulations authorized private cable operators to refuse to carry indecent programming on leased access channels; or, if they decided to do so, to segregate that material on a blocked channel. *Id.* (to be codified at 47 C.F.R. § 76.701(a)). A cable operator must satisfy a subscriber's written request to receive a blocked channel within thirty days. *Id.* (to be codified at 47 C.F.R. § 76.701(c)).[2]

[2] With respect to leased access channels, the 1992 Act also directed the Commission to determine the maximum reasonable rates for leased access use, to establish reasonable terms and conditions for such use, including those for billing and collection, and to create procedures for expedited resolution of rate or carriage disputes. Pub. L. No. 102-385, § 9, 106 Stat. 1460, 1484-86 (1992) (codified at 47 U.S.C. § 532(c)(4)(A)(i)-(iii)). The 1984 Act had permitted operators to negotiate with programmers the prices and terms for leased access. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.05, at 6-50, 6-57 (1994).

The Commission's second Report and Order contained regulations implementing section 10(c), which applies to PEG access channels. These regulations authorized cable operators to prohibit programming on PEG access channels if it "contains obscene material, indecent material . . ., or material soliciting or promoting unlawful conduct." [3] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702). The regulations permitted cable operators to require PEG access programmers to certify that their programming contains no material in these categories. *Id.*

II

A

Obscenity has no constitutional protection, and the government may ban it outright in certain media, or in all. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992). But an "indecent" program, as the Commission and the statute de-

---

For PEG access programming, the 1984 Act authorized local franchising authorities to determine minimum PEG requirements, including allocation of channel capacity to users, availability of equipment and facilities, charges for costs, and requirements that PEG access channels be included in the basic cable tier. Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 147–48 (1991). The 1992 Act explicitly authorized franchising authorities, when awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." Pub. L. No. 102–385, § 7(b), 106 Stat. 1460, 1483 (1992) (codified at 47 U.S.C. § 541(1)(4)(B)).

[3] The regulations define "material soliciting or promoting unlawful conduct" as "material that is otherwise proscribed by law." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

fine the term, is not necessarily an obscene program.[4] While the government may nevertheless restrict the showing of indecent programs, it may do so only in a manner consistent with the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). If decisions of cable operators not to carry indecent programs on leased or PEG access channels, decisions sections 10(a) and 10(c) permit, were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions.

So far as sections 10(a) and 10(c) and the corresponding regulations are concerned, the case therefore turns on the presence or absence of "state action." The First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press" restricts only the government. It does not control private conduct. Before one may determine whether actions taken by cable operators with respect to indecent programming on leased and PEG access channels comport with the First Amendment, one must decide whether those actions may be attributed to the government.

Petitioners initially deny that the case presents any serious state action problem: Congress enacted section 10(a) and section 10(c), and a federal agency issued regulations putting

[4] An indecent program is one that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(g)). As all agree, this definition of indecency does not encompass all of the elements of obscenity. A work is legally obscene, according to *Miller v. California*, 413 U.S. 15, 24 (1973), if (a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, ...;" (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

the provisions into effect; these were official actions of the government; hence state action exists. Matters are not quite so simple, however. If the government had commanded a particular result, if it had ordered cable operators to ban all indecent programs on access channels, the operators' compliance would plainly be attributable to the government. *See Action for Children's Television v. FCC*, 932 F.2d 1504, 1508–09 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992). State action would exist for the same reason that the government's compelling private entities to conduct searches renders the ensuing searches subject to the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). But sections 10(a) and 10(c) do not command. Cable operators may carry indecent programs on their access channels, or they may not. It is true that the Supreme Court has found state action even though legislation, rather than compelling a result, left the matter to the discretion of private actors. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), are such decisions. But neither *Larkin* nor *Loretto* resembles the case before us. State action existed in both of those cases because the government conferred on private parties power that "traditionally [had been] the *exclusive* prerogative" of the government (*San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987)), in *Larkin* the power to veto liquor licenses, in *Loretto* the power to enter and occupy private property without the owner's consent. By contrast, determining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government at any level. That section 10 is a federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 165–66 (1978).

The question remains whether section 10 and the regulations establish a "sufficiently close nexus" between the government and cable operators regarding indecent programming on access channels so that state action is present. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974);

Skinner, 489 U.S. at 615. We agree with petitioners that the question must be answered in view of the precise nature of their objection. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). But what is the nature of their objection? One frame of reference reveals "a battle for supremacy between the asserted rights of private persons." Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230. That is, petitioners are merely complaining about section 10(a)'s and section 10(c)'s restoring to cable operators' *their* option to reject indecent programming on *their* cable systems. Cable operators "are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. at 2456. When an operator decides what programming will appear on its system, the operator engages in free speech. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. at 707. It is therefore easy to see how sections 10(a) and 10(c), by giving operators editorial control over indecent programming on their systems' access channels, promote the operators' freedom of speech.[5] Petitioners, on the other hand, do not spell out in their briefs exactly how the same provisions retard their freedom of speech. We gather from their submissions to the Commission that they have members who wish to watch programs on access channels describing or depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium"; and that the programmers who count themselves among the petitioners wish to produce this sort of material for television. These interests will be damaged, petitioners told the Commission, because sections 10(a) and 10(c) will reduce the amount of indecent programming on cable access channels. The idea appears to be that if legisla-

[5] We express no view on whether the provisions of the 1984 and 1992 Acts requiring cable operators to set aside leased access channels and permitting franchising authorities to force operators to set aside PEG access channels infringe upon the First Amendment rights of cable operators or programmers.

tion altering the existing state of affairs threatens to lessen the quantity of indecent speech, the government bears the legal responsibility for the private decisions causing that result.

The question naturally arises—less indecent programming as compared to what? The status quo ante? If the state of affairs under the 1984 Act were the baseline from which to measure, as petitioners assume without stating why, their assessment of section 10's impact might be accurate. The 1984 Act did not permit cable operators to decline indecent programming on access channels; after the 1992 amendment, they had that option. But what of the period before 1984? The Supreme Court's 1979 decision in *Midwest Video* relieved cable operators of the obligation, then imposed by regulation, to provide leased access and PEG access channels. Under those early regulations, operators were required—with respect to both types of access channels—to establish rules prohibiting the "presentation of . . . obscene and indecent matter." 47 C.F.R. § 76.256(d)(1)-(2) (1976); *see Midwest Video*, 440 U.S. at 693 n.4. As compared to the situation before the 1979 *Midwest Video* decision, when indecent programming on access channels was entirely forbidden, section 10 of the 1992 Act permits more—not less—such programming. Still another comparison presents itself. Rather than focusing only on the pre–1992 and post–1992 situations with respect to access channels, one might contrast access channels with other cable channels. Cable operators have always had the discretion not to carry indecent programming on their non-access channels. Yet no one would contend that the First Amendment constrained the operator's editorial judgment in this regard. We therefore cannot agree with the premise implicit in petitioners' arguments—that the 1984 Act gave rise to the constitutionally proper quantity of indecent access programming. The First Amendment did not compel the 1984 Act, and it certainly did not compel prohibiting cable operators from exercising any editorial control over access programming.

This, we believe, places in the proper perspective petitioners' charge that section 10 of the 1992 Act "establishes" a

"procedural scheme of private censorship." Brief for Petitioners at 20, 27. If "censorship" is understood as editorial control, petitioners are partly correct, but their description does not translate into state action. The 1984 Act also initiated what may be described as a system of "private censorship." From 1984 until 1992, Congress gave private parties in charge of programming on leased access channels complete control, free from any operators' oversight, regarding what the cable television audience could see on these channels. During that eight-year period, programmers were the ones exercising control over the content of access programming. In petitioners' terms, they were the ones acting as "private censors." When the 1992 Act gave cable operators the option of vetoing decisions of access programmers to televise indecent programs, it simply adjusted editorial authority between two private groups.

As we see it, therefore, petitioners have merely discovered an inherent characteristic of cable systems: the more discretion a cable operator has over what will appear on its system, the less discretion resides in those who have been given access to the operator's system (and vice versa). To suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating. No analogous state action decision of the Supreme Court—including *Reitman v. Mulkey*, 387 U.S. 369 (1967), from which the original panel took "specific guidance" and on which it relied almost exclusively for its state action analysis (*Alliance for Community Media*, 10 F.3d at 818–22)—has ever gone so far.

Reitman may have leapt to mind because it too involved legislation modifying statutory restrictions on private parties. But not much can be made of the case for our purposes, certainly not nearly as much as the original panel made of it. Petitioners seem to share our judgment. *Reitman* is cited but once in their *in banc* briefs, and then only in a footnote to

support the notion that it embodies a state action standard no different than *Blum v. Yaretsky*, which we will discuss more fully in a moment. Brief for Petitioners at 32 n.16. *Reitman* began as a suit between private parties, with the plaintiffs claiming they had been denied an apartment on the basis of their race in violation of a state housing law. In 1964, while the suit was pending, California voters approved Proposition 14, a state constitutional amendment (Art. I, § 26) prohibiting the state or any subdivision or agency thereof from denying or limiting the right of any person to sell, lease or rent his real property to any "persons as he, in his absolute discretion, chooses." 387 U.S. at 371. One effect of adding § 26 to the state constitution was to repeal the state law prohibiting private racial discrimination in housing. If this were all § 26 accomplished, the case might have come out differently: "simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 539 (1982). But in *Reitman*, Justice White, speaking for four other Justices, demonstrated the fallacy of thinking § 26 had only the effect of repealing antidiscrimination legislation. 387 U.S. at 376. "The section struck more deeply and more widely." *Id.* at 377. "Private discriminations in housing ... enjoyed a far different status [after enactment of § 26] than was true before passage of [the state] statutes" outlawing private racial discrimination. *Id.* After § 26, minority groups who sought new fair housing laws in California would somehow have to get the state constitution amended before they could even attempt to convince the legislature to enact such laws, while those seeking other legislation could proceed directly to the legislature. By placing this impediment in the way of new anti-discrimination measures, § 26 itself discriminated against minority groups, and for that reason constituted action of the state forbidden by the Fourteenth Amendment.

This has long been the accepted understanding of *Reitman*. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 420 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1700 (2d ed. 1988); Charles L. Black, Jr., *The*

Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 75, 82 (1967); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 247; Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 51.[6] So understood, the decision cannot support a finding of state action here. Congress may modify section 10 of the 1992 Act anytime it chooses, just as it modified the related provisions of the 1984 Act. There are no special impediments to its doing so.

Apparently recognizing this, petitioners invoke not *Reitman*, but the statement in *Blum v. Yaretsky*, 457 U.S. at 1004, that "although the factual setting of each case will be significant," the government "normally" can be held accountable for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." The Court followed this qualified declaration with another qualification: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004–05.

The "coercive power" element in the *Blum* formulation has no application here for reasons already suggested. Rather than coerce cable operators, section 10 gives them a choice.[7]

---

[6] The panel opinion deemed it "not critical" that "*Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution." *Alliance for Community Media*, 10 F.3d at 820 n.8. The Supreme Court in *Reitman* and in *Crawford*, and each of the authors cited in the text, thought the opposite.

[7] Judge Wald mixes apples and bricks in her four formulations of the combined effect of § 10(a) and § 10(b). Dissent at 5. Take for example, her number 1: " 'an operator *must* ban, or in the alternative *must* block' " indecent programming on leased access channels.

Section 10(b)'s segregation and blocking requirements apply to "cable operators [who] have not *voluntarily* prohibited" indecent programming on leased access channels. Pub. L. No. 102–385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)) (emphasis added). The Commission too put the matter in those terms. Its first Report and Order states that any prohibition of indecent programming on leased access channels will be "voluntary, not mandatory" and that Congress did not intend cable operators to "act as involuntary government surrogates." First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 30 (1993). Section 10(c) is to the same effect. It instructs the Commission to promulgate regulations *enabling*—not requiring—cable operators to prohibit indecent programming on PEG access channels (Pub. L. No. 102–385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 531)) and the Commission's implementing regulation provides that cable operators "may" prohibit indecent programming on PEG access channels. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

Operators who block are necessarily operators who have not banned indecent speech. They are carrying such programs on their systems and are leaving to their subscribers the choice of tuning in. Despite all the fancy footwork, the formulations merely report that (1) under these provisions operators now have the editorial discretion to carry or not to carry indecent programming on their leased access channels; and (2) if they opt to carry such programming, they have to comply with § 10(b). To conclude from this that the operators' decisions are state action is the same as saying that if you are deciding whether to enter a particular line of business regulated by the state, your decision whether to enter the business is "state action." You "must" comply with regulations, or you "must" stay out. Or closer to home, Judge Wald would find state action when an Indiana bar decides whether to have nude dancing—in her formulation, the bar either must ban nude dancing or it must block children and others who do not consent to watching the show. *Cf. Barnes v. Glen Theatres, Inc.*, 111 S. Ct. 2456, 2461 (1991).

As to the remaining portion of the *Blum* formula, petitioners offer three ways in which section 10 "has provided such significant encouragement" to cable operators not to carry indecent programming on their PEG and leased access channels that state action must be found. The first borrows from the original panel opinion's assertion "that the immediate objective of the 1992 Act is to suppress indecent material and limit its transmission on access channels" and that "the government wishes to suppress" such material on access channels. *Alliance for Community Media*, 10 F.3d at 820; Brief for Petitioners at 28. There is no doubt that section 10 embodies an objective, but it is one rather different than that described in the passages just quoted. The immediate aim—all that can be discerned from the language of the statute—is to give cable operators the prerogative not to carry indecent programming on their access channels. Experience under the 1984 Act moved Congress to legislate as it did.

"The problem," Senator Helms stated during the floor debate, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that consist of a wide variety of highly indecent material. 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). The Senator described leased access programming in New York City that "depicts men and women stripping completely nude"; another featuring people performing oral sex; a channel with ads promoting "incest, bestiality, [and] even rape"; and a channel in Puerto Rico carrying the Playboy Channel. *Id.* As he also pointed out, leased access channels are "not pay channels, they are often in the basic cable package." *Id.* Senator Thurmond mentioned leased access channels with "numerous sex shows and X-rated previews of hard-core homosexual films," as well as channels with ads for phone lines letting listeners eavesdrop on acts of incest. *Id.* at S648. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone . . . [solicit] illegal activities." *Id.* at S649 (statement of Sen. Fowler); *see also id.* at S650

(statement of Sen. Wirth) (agreeing that public access "clearly ... has ... been abused").

Before the Commission, many commenters recognized that indecent programs had been transmitted on cable access channels, both leased and PEG. Time Warner Entertainment informed the Commission that its New York City cable subsidiary carries a leased access program ("Midnight Blue") which "include[s] excerpts from sexually explicit video cassettes and films showing in graphic detail intercourse, masturbation and other sex acts," and which advertises "sex-oriented products and services, such as 'escort services,' 'dial-a-porn' telephone lines and Screw Magazine ('Midnight Blue's' print counterpart)." Comments of Time Warner Entertainment Co., L.P., at 3 (Dec. 7, 1992). The company reported that its leased access channel on which Midnight Blue appears is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m.," and "the demand for additional time remains high." *Id.* The record before the Commission showed that indecent programming was also a problem on PEG channels. For example, the Commission was informed that programming transmitted over the public access channel serving the City of Tampa, Florida, included "visual depiction[s] of male and female nudity ... simulated sexual activity, and/or sexually related physical contact between performers and audience members." Comments of City of Tampa, at 2 (Dec. 7, 1992). A Tampa viewer described turning on her local public access channel in prime time and seeing "[t]otally nude women ... squatting and gyrating so that their genitals were in full view," and "a tape of a totally naked man dancing and screaming obscenities." Comments of Virginia B. Bogue, at 1 (Dec. 4, 1992). And one large cable operator noted that a public access channel on one of its systems transmitted a program "in which an access user, frontally nude, urinated on a photograph of the President of the United States." Comments of Continental Cablevision, Inc., at 4 n.3 (Dec. 7, 1992).

Congress could consider itself accountable for the appearance of these and other such programs. The 1984 Act made them possible by compelling cable operators to set aside leased access channels and, at the franchising authorities' direction, PEG access channels, and by barring the operators

from exercising any editorial judgment over what would be shown there. Whatever may be said in support of indecent programming on access channels,[8] Congress surely does not have to promote it. In dealing with cable television, Congress, no less than states dealing with relations between races, cannot "be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice."[9] *Crawford v. Board of Educ.*, 458 U.S. at 539. Section 10 of the 1992 Act extricated Congress from its promotional role, not by banning indecent programming on access channels, but by permitting cable operators to "police their own systems," which the 1984 Act had prevented them from doing. 138 CONG. REC. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

We have no doubt that among the Members of Congress who voted for the 1992 Act there are those who would applaud any cable operator's decision not to carry indecent programming on access channels, or for that matter, on any channel. Even if we equated the view of some Members with the view of a majority, and even if we pretended that their preferences had somehow manifested themselves in statutory language, this still would not be sufficient to transform a

[8] "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance...." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976); *see FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978).

[9] In light of *Crawford*, 458 U.S. at 538, a State's "mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place" does not make private individuals state actors so that their treatment of others on the basis of race is governed by the Fourteenth Amendment. By analogy, the Constitution did not require Congress to bar operators from exercising editorial control over indecent programming on access channels; and, contrary to Judge Wald (Dissent at 7 n.4), when Congress removed the bar in 1992 it did not transform operators into state actors.

particular operator's decision not to carry indecent programs on its access channels into a decision of the United States. "Mere approval of or acquiescence in the initiatives of a private party," *Blum* reminds us, cannot "justify holding the State responsible for those initiatives," 457 U.S. at 1004–05; *see Flagg Bros. v. Brooks*, 436 U.S. at 164.

Nor does state action result simply because legislation "encourages" the private initiative in the sense of making it possible.[10] *Blum* rejected a procedural due process challenge to decisions of state-subsidized private nursing homes, made without a hearing, to downgrade the level of treatment for patients on Medicaid. Federal Medicaid regulations required nursing homes to maintain different treatment levels and to transfer patients whenever necessary; when a nursing home downgraded a patient's treatment, the State reduced the patient's Medicaid payments. 457 U.S. at 994–95. In *Blum*, the "State was indirectly involved in the transfer decisions . . . because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). "State and federal regulations encouraged the nursing homes to transfer patients to less expensive facilities when appropriate." *Id.* The nursing homes' transfer decisions were nevertheless private decisions, dependent upon the medical judgment of physicians, and thus not governed by the Constitution. *Blum*, 457 U.S. at 1012. So too with section 10 of the 1992 Act, which facilitates cable operators' editorial control over indecent programming, but does not dictate the outcome or

[10] For instance, it cannot be that because access channels came into existence as a result of governmental action, the private day-to-day decisions—by programmers or by cable operators—about what will be shown on those channels embody state action. The federal government may create corporations but the resulting quangos are not, for that reason alone, to be treated as governmental rather than private actors. *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 974–75 (1995); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 543 n.23; *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1125 (D.C. Cir. 1985).

the criteria operators may use in exercising their judgment about whether such programming appears on their access channels.[11]

The second way in which section 10 satisfies the *Blum* formulation, according to petitioners, is by creating "financial incentives" for operators not to carry indecent programming. The idea is that rather than incurring the costs associated with section 10(b)'s requirements, cable operators will opt for the less expensive alternative of simply banning indecent programming from leased access channels.[12] To support this prediction, petitioners quote a cable operator's comment to the Commission:

> Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a *de facto* ban.

Comments of Continental Cablevisions, Inc., at 10 (Dec. 7, 1992). One notices immediately the significant condition in the comment—"If operators are not permitted to recover these costs in full...." Nothing in section 10 specifies that the costs associated with segregation and blocking must be

[11] Judge Wald would disregard *Blum* on the ground that the complaint there challenged the decisions of private actors, while the petition here challenges a federal statute and its implementing regulations. Dissent at 6–7. There is nothing to this. The private actors in *Blum* made their decisions pursuant to detailed state and federal regulations, *Blum*, 457 U.S. 993–95, and the Court evaluated the regulations to determine whether they dictated the private decisions at issue, *id.* at 1006–10.

[12] This argument could not supply state action with respect to section 10(c)'s authorization to operators to prohibit indecent programming on PEG channels. Section 10(b)'s segregation and blocking requirement applies to leased access channels only. We cannot imagine how that requirement could influence an operator's decision about allowing indecent programming on PEG channels.

borne by cable operators, and the Commission has yet to consider the matter. The Commission has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation. First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 32 n.29 (1993); *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 F.C.C.R. 5631, 5943 ¶ 502 n.1293 (1993). The situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming.

Judge Wald, in her dissent, also predicts that because section 10(b)'s segregation-and-blocking arrangement is "technically and administratively cumbersome," operators will choose to ban indecent speech. Dissent at 8–9. Hence, there is "state action" with respect to section 10(a) and leased access channels.[13] We do not understand the "technically" part of this proposition. The comments of the National Cable Television Association, Inc., the principal trade association for the cable television industry, mentioned no technical difficulties in implementing section 10(b). And for good reason. Every cable system that has premium or pay-per-view chan-

[13] On this unfounded prediction, on this single assertion, rests the entirety of Judge Wald's reasoning that § 10(a) constitutes state action for leased access channels. But what of PEG access channels, where operators have discretion under § 10(c) to carry indecent programming without any segregation and blocking? Judge Wald, without the support of Chief Judge Edwards, or Judge Rogers, offers a different rationale for detecting state action in § 10(c)—that the provision is a "content-based regulation of protected speech." Dissent at 28. Of course that thoroughly begs the question. The First Amendment protects speech not from private interference but only from *governmental* restraints. One cannot say of § 10(c) that operators might be restricting "protected speech" until one first makes the threshold determination that the actions of the operators are attributable to the government. Otherwise, whenever cable operators make content-based choices not to carry particular programming on any channel, there would be state action because the speech is "protected" and because the governing statute does not force the operators to carry it.

nels already is constantly blocking and unblocking them and thus has the technical capability to perform this task. Perhaps there are smaller systems that do not have such channels. But the Commission took care of that difficulty in its First Order: it gave operators the choice of installing lockboxes (*see infra* p. 36) and retaining the key or numeric code until the customer requests unblocking. First Order and Report, 8 F.C.C.R. at 1009 n.46.[14] As to Judge Wald's point about "administrative" burdens, this is a matter of costs, of who should bear the financial burden of implementing section 10(b). As we have already mentioned, that question will be determined in future proceedings. In deciding this facial challenge to the regulations we are unwilling to speculate about the outcome of those proceedings. Still less are we willing to assume that the burden of implementing section 10(b) represents "such significant encouragement" (*Blum*, 457 U.S. at 1004) that the operators' choice must be deemed to be the choice of the government. The record, sparse as it is on this point, contains material pointing in the opposite direction.

Time Warner's request, which the Commission granted, to allow operators "to provide an additional blocked leased channel for indecent programming if the first channel becomes full," is at odds with petitioners' and Judge Wald's prediction that the cost of implementing section 10(b) will force operators to ban indecent programming altogether. First Report and Order, 8 F.C.C.R. at 1009 ¶ 66. Even smaller cable systems were worried about their blocked leased access channels filling up, a concern that makes sense only if they anticipated carrying indecent programming. The burden was on petitioners, as the complaining parties, to show that be-

[14] The Commission mentioned "technical" problems but these dealt with timing—that is, with how quickly operators could implement segregation and blocking. In order to avoid any such problems, the Commission allowed the operators 120 days to implement blocking mechanisms and procedures. First Order and Report, 8 F.C.C.R. at 1009. In this litigation the sufficiency of that time period is not challenged.